WONG THIN YIT v. MOHAMED ALI

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) July 9, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 28 of 1971]

Negligence — Highway — Finding of fact by trial judge — Appeal — Whether court bound by finding of fact.

Damages — Leg — Amputation of right leg.

This was an appeal against the judgment of the High Court whereby the appellant was held entirely to blame for a road accident resulting in injuries to the respondent for which he was awarded a sum of $32,000 by way of general damages. The object of the appeal was to seek apportionment of blame between the parties.

Held, dismissing the appeal (Gill & Ali F.JJ.; Ong C.J. (Malaya) dissenting): the judgment appealed from was based entirely on findings of fact and it was not open to the court to set aside such findings of fact.

Per Ong C.J. (dissenting): "I do not think it is correct to assume, as a matter of course, that because the trial judge had seen and heard the witnesses, he must necessarily be right. In my opinion, even where he has been impressed by the demeanour of certain witnesses, the appellate court has still an obligation to scrutinise their evidence."

Cases referred to:-

(1) *Plunkett* v. *Bull* 19 C.L.R. 544, 548.

(2) *Hill v. Wilson* 8 Ch. App. 888.

(3) *In re Garnett* 31 Ch. D. 1.

(4) *Lachmi Parshad* v. *Maharajah Narendro Kishore Singh Bahadur* L.R. 19 I.A. 9.

(5) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

(6) *Yuill* v. *Yuill* [1945] 1 All E.R. 183, 188.

(7) *Kerry v. Carter* [1969] 1 W.L.R. 1372, 1376.

(8) *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001.

(9) *G. (A)* v. *G. (T.)* [1970] 2 Q.B. 643.

FEDERAL COURT.

R. T. S. Khoo for the appellant.

K. Balakrishnan (*G. S. Ram* with him) for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): At about 9 a.m. on February 21, 1969 three small Tamil boys were on a lonely stretch of the Kampar-Teluk Anson Road when one of them was knocked down by a motor-cycle driven by the defendant. His right leg was fractured and had to be amputated at the knee. Suing by his father, he was awarded damages by the High Court at Ipoh on the ground that the accident was entirely due to the negligence of the defendant. The object of this appeal is to seek apportionment of blame between the parties.

The defendant as well as the Tamil boys were proceeding in the same direction. The road was 18 feet wide and clear of other traffic. The plaintiff's case was that he was walking 2 feet away from the left edge of the road, along the grass verge — as were his two friends following about 12 feet behind him — when the defendant came on to the grass and knocked him down. He and his friends were positive that they were 2 feet inside the grass verge when the accident occurred.

The defendant's insurers, who defended the case on behalf of their assured, were unable to produce him at the trial to give evidence on his own behalf. His disinterest in the matter hardly needs explanation. The case is, in my view, indistinguishable from that where the defendant is unable to defend himself because he is dead. The court in such event applies a wise and salutary rule. As Isaac J. put it in *Plunkett* v. *Bull*: [1] "... in cases of this sort the court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue."

See also *Hill* v. *Wilson;*[2] *In re Garnett;*[3] *Lachmi Parshad* v. *Maharajah Narendro Kishore Singh Bahadur.*[4]

In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.": see 15 *Halsbury* (3rd Ed.) p. 260.

In the instant case there was no ambiguity in the plaintiff's evidence as to where he was when he was knocked down. He was "in fact walking on the grass verge about 2 feet away from the edge of the road". But was his evidence accepted as *proof* of the allegation? I think not. As Ali F.J. just stated in his judgment, the learned trial judge "was not, however, altogether satisfied that the collision occurred on the grass verge as stated by the plaintiff's witnesses." And Gill F.J. says:

"The first ground of appeal is that the learned trial judge erred in holding that the accident could have happened on the grass verge. The short answer to that is that the learned trial judge *did not say categorically that the accident happened on the grass verge.* The finding of fact which he made was that the accident took place at a point somewhere near the left edge of the road."

If the trial judge did accept the evidence of the plaintiff and his witnesses, he should have said so in the plainest of terms, instead of leaving us to guess what he did find as a fact. The plaintiff was either 2 feet inside the grass verge, as he claimed, or he must have been on the road. And yet the trial judge was unable to "say categorically that the accident happened on the grass verge". In my view, therefore. it is clear enough that he was not satisfied as to the truthfulness of the plaintiff or his witnesses.

It is equally clear to me, from his grounds of judgment, that under the circumstances he relied mainly on the sketch plan and photographs in the agreed bundle of documents as supporting the plaintiff's case. He said as follows:

"From the scratch mark shown in the sketch plan it was apparent that it was made by the motor-cycle. The position of the scratch mark as well as the positions of the basket and cakes shown in the sketch plan and in the photographs tended to indicate that the accident took place at a point somewhere very near the left edge of the road — either on the grass verge or on the road."

When pronouncing judgment on February 23, 1971 it seems to me that the trial judge must have done so

on the assumption that the motor-cycle went into the grass verge, as the plaintiff averred. If that were true, the defendant was of course entirely to blame. But when the judgment later came to be written on April 14, after necessary scrutiny of the plan and photographs, it is clear that the trial judge was no longer as satisfied that the accident happened inside the grass verge. Only a modified version of the plaintiff's story would avoid a conflict with the mute testimony of the plan and photographs. Accordingly the trial judge was forced to the conclusion that the accident might well have happened on the road, though close to its edge, however stoutly the plaintiff and his witnesses maintained the contrary. With the greatest respect, I do not think that the learned trial judge was entitled, in disregard of the evidence, to state the plaintiff's case in a way which the plaintiff himself never did or attempted to do.

The judge had found as a fact that the scratch marks on the road were made by the motor-cycle. At "K" on the sketch plan, where the mark started, the distance from the edge of the road was 1 foot 8 inches and at "S" 1 foot 10 inches away. Between "K" and "S", a distance of 40 feet, was the basket carried by the plaintiff, lying 2 feet 10 inches from the grass. There was evidence of the police sergeant that broken glass from the motor-cycle headlamp was found scattered on the road surface in addition to the cakes contained in the basket, which are also visible in the photographs. There were no signs of the motor-cycle hitting the plaintiff on the grass verge. (The police officer's evidence put in by consent is, in my opinion, admissible under section 33 of the Evidence Ordinance).

The scratch mark could only have been made by the footrest after the motor-cycle fell on its side. The photograph "E" shows the right footrest neither damaged nor bent. Its height above ground could not have been more than 10 inches. Hence, assuming that the mark was made by the left footrest, the motor-cycle, as it fell, must have been more than 1 foot 8 inches from the grass. In any event, whether it was the left or right footrest which made the mark, the motor-cycle clearly fell on the road and continuing to proceed, while on its side, in a straight line.

Here I should observe that I am not forgetting the fact that the motor-cycle fell after colliding with the plaintiff and the point of impact must naturally have been somewhere before one comes to "K". Could this point of impact have been on the grass or on the road? The line of the scratch, if projected backwards from "S" beyond "K", would still be on the road and gives some *clue to the point of impact*. Of more significance still is the fact that the scratch mark was parallel to the edge of the road. An inanimate object propelled forward moves along a definite path in accordance with physical laws. Had the path of the scratch been a curve, it should continue as a curve unless the object on its course was deflected by a heavier or immovable object. Now, what was the path alleged to have been followed by the motor-cycle before and after the collision? Kunasegaram, the oldest boy who was 12 at the time of the accident and the plaintiff's own witness, said as follows:

"Before this incident there was no traffic on the road either from in front or from behind. I could recognise the sound of the motor-cycle. I did turn round to look at the motor-cycle. When I first saw this motor-cycle it was about 5 feet to 6 feet away. The motor-cycle was then on the road. But the motor-cycle came suddenly on to the grass verge and came straight towards me. So I moved further away but the motor-cycle grazed my leg. Kumaran was then to my left. I jumped to my left and I knocked into Kumaran and he too fell on the grass verge. The rear wheel of the motor-cycle grazed my leg. I still had time to shout out to P.W. 1. I only shouted out P.W. 1's name but before he could turn round the motor-cycle hit him. I agree that all these things happened in a short space of time. P.W. 1 was on the grass verge when the motor-cycle hit him. Even though I fell down I still saw the motor-cycle hit P.W. 1. P.W. 1 fell on the grass verge. The basket which he was carrying also fell on the grass verge. I deny that this accident happened when my friends and I were running across the road. I did not discuss about this case with P.W. 1. The motor-cycle fell on the road after the accident. The cycle came from the road to the grass verge. Then it grazed me and after that it hit into P.W. 1 also on the grass verge and after that the motor-cycle fell on the road."

Remembering that this witness was about 12 feet behind the plaintiff, the motor-cycle according to him, must have mounted the grass verge at a tangent from the road, then travelled far enough on the grass to hit the plaintiff and finally regained the road. This curve or arc was a fairly tight one, in which case one should have expected the motor-cycle, now out of control, to follow the path of the curve across the road. Could it have made a straight line from "K" to "S"? I think not.

In my opinion, Kunasegaram told a cock-and-bull story in the evidence I have just quoted. The events he described did not take place in slow motion. Hence, in the fraction of a second that the motor-cycle travelled some 20 feet he could not have had time to shout a warning, as the plaintiff also said he did. In this connection I think the warning shouts of the boys to one another suggest a more plausible explanation. Ordinarily neither children, nor adults for that matter, call one another's attention to every passing vehicle. Hence I ask myself: why did they have to do so in this case unless the situation was unusual in that they were in danger themselves? If it was true that all three boys were well off the road when the motor-cycle was approaching, the occasion certainly called for no remarks. Why then should this particular vehicle have evoked from them shouts of warning? Unless, it seems to me, they were where they ought not to be — crossing the road in the path of an oncoming vehicle.

That was the defendant's explanation. Its rejection in favour of the plaintiff's story *in toto* means in effect that the defendant, an ordinary man, for no rhyme or reason, who had no cause for losing control of his motor-cycle, must then have deliberately driven his machine at the boys, knowing that he was liable to cause serious injury not only to them but also to himself and damage to his motor-cycle. I cannot accept any such theory. If such was not the case, what were the probabilities?

I now turn to the defendant's own story. Was there any improbability at all in children straying onto the road — especially in play? He said he saw the children going across and suddenly turning back: he braked, took evasive action but unfortunately failed to avoid collision with one boy. And, if it was true that the boys were walking along the roadside, as they had every right to do, why was it necessary for them to conceal that fact and assert that they were inside the grass verge? Even so, why should the defendant have run into them any more than the other pedestrians whom he encountered on the way from Kampar? As to the injury to the plaintiff's right leg, it is true that if he had turned his left side towards the motor-cycle when attempting to go back to the roadside, his left leg should have been exposed to the impact. But the fact that his right leg was fractured is far from conclusive, since the injury would depend upon the position of his body *vis-a-vis* the motor-cycle, as to which there are several possibilities. So I do not think the nature of the plaintiff's injuries affects the issue.

In this case I am of opinion that an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts: see *Benmax* v. *Austin Motor Co. Ltd.*[5] I do not think it is correct to assume, as a matter of course, that because the trial judge had seen and heard the witnesses, he must necessarily be right. In my opinion, even where he has been impressed by the demeanour of certain witnesses, the appellate court has still an obligation to scrutinise their evidence for the reasons stated by Greene M.R. in *Yuill* v. *Yuill*[6] as follows:

"Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

On the function of an appellate court, I would quote Lord Denning M.R. in *Kerry* v. *Carter*[7] as follows:

"We have been referred to cases on this subject, particularly the recent case of *Brown* v. *Thompson* [1968] 1 W.L.R. 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p. 1012, by Edmund Davies L.J. when he quoted from the judgment of Sellers L.J. in *Quintas* v. *National Smelting Board* [1961] 1 W.L.R. 401, 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly."

In the instant case I have no hesitation in saying that the learned trial judge was wrong. The plaintiff's case was simply that, while he was on the grass verge, the defendant knocked him down. That was the nature of the defendant's negligence specifically alleged against him. It was therefore not open to the plaintiff to rely on any alternative situation accounting for his presence on the road or any portion of the road — indeed his evidence was otherwise. If he was on the road the onus was on him to explain how he stepped off the grass. There was no such explanation. If he was not on the grass, he might have been anywhere on the road and thereby caused or contributed to his own injury. Since Gill F.J. holds that the defendant's police report was not substantive evidence, the position is no different from where a submission of no case has been made by the defendant. Having heard the case for the plaintiff, the judge was not prepared to say categorically that he was satisfied that the collision occurred on the grass verge. Could he, any more than the plaintiff, set up a case of negligence against the defendant which was never even suggested by the plaintiff?

I deeply sympathise with the unfortunate child, but hard cases make bad law. It is not within the discretion of this court to let sympathy lend weight to the evidence on either side. Having considered all the circumstances — which need not be gone into in detail by reason of the majority decision — all I need say is that I should have allowed the appeal with costs and apportioned the blame so that it is shared equally.

Gill F.J.: This is an appeal from a judgment of Pawan Ahmad J. whereby the defendant/appellant was held entirely to blame for a road accident resulting in injuries to the plaintiff/respondent for which he was awarded a sum of $32,000 by way of general damages.

The accident took place on February 21, 1969 at about 9 a.m. Shortly afterwards, at about 10.40 a.m., the defendant made a report at Kampar police station in which he stated as follows. He was travelling on his motor-cycle at about 25 m.p.h. along Kampar/Teluk Anson road when on arriving at a bridge he noticed three children about 30 yards in front of him crossing the road from left to right. As he applied his brakes the three children suddenly walked back to the left side and he swerved to the left, with the result that he knocked into one of them. He fell forward from his motor-cycle on the road and the child fell on the grass verge.

The respondent's report to the police formed part of the agreed bundle of documents which was put in by consent at the commencement of the trial of the action. Amongst the other documents in the agreed bundle were a sketch plan and photographs of the scene of the accident and the notes of evidence taken in a summons case against the defendant in the magistrate's court at Kampar which ended in his acquittal without his being called upon to enter his defence.

The trial of the action took place on January 21 1971. The plaintiff's evidence in court was that just before the accident he was walking in the direction of Teluk Anson on his correct side of the road along the

grass verge about 2 feet away from the left edge of the road, carrying on his right shoulder a basket of cakes for sale, when he suddenly heard the sound of a motor-cycle from behind. Two of his friends, Kunasegaram (P.W. 2) and Kumaran (P.W. 3), who were walking behind him at a distance of some 20 feet, shouted out to him that a motor-cycle was coming. As he was about to turn round to look, the motor-cycle knocked him down as a result of which he became unconscious.

P.W. 2 and P.W. 3 substantially corroborated the evidence of the plaintiff, each of them testifying that they were walking abreast on the grass verge about 12 feet behind the plaintiff when they heard the sound of a motor-cycle coming from behind. P.W. 2 said that the motor-cycle grazed him causing him to fall down and that in jumping to his left he knocked into P.W. 3 who also fell on the grass verge. P.W. 3 confirmed that P.W. 2, on being grazed by the motor-cycle, fell on him causing him to fall into the earthen drain nearby.

At the close of the case for the plaintiff counsel for the defence asked for an adjournment because the defendant was absent. The case was adjourned to February 23, 1971, on which date counsel for the defence informed the court that in spite of several attempts he had been unable to trace the defendant and that therefore he was unable to produce any evidence. The learned trial judge was thus left to decide the case on the evidence of the plaintiff and his witnesses and such documentary evidence as was put in by consent of counsel for both parties.

It is to be observed that the plaintiff and his witnesses were approximately 12, 13 and 12 years old respectively on the date of the trial, so that they were 10, 11 and 10 years old respectively on the date of the accident. They were not affirmed or put on oath when they began giving their evidence in court, but they were given the usual warning to speak the truth and they were cross-examined. The statement of the defendant contained in his report to the police, on the other hand, was not substantive evidence, although it could have been used to corroborate the evidence which might have been given by the defendant in court, or to confirm his credit, under sections 157 and 158 respectively of the Evidence Ordinance, 1950. Similarly, the notes of evidence in the summons case in which the defendant was acquitted without being called on to enter his defence were not substantive evidence in the action, although they could have been used to impeach the credit of any of the witnesses. The plaintiff and his witnesses gave evidence in that summons case, but such evidence was not used to impeach their credit when they gave evidence at the trial of this action. In any event, the statement of the defendant in the police report that the children in front of him were crossing the road from the left to the right and then suddenly walked back to the left side was denied by the plaintiff and his witnesses, and there is nothing to suggest that their evidence to that effect was shaken under cross-examination.

Coming to the other documentary exhibits in the case, the sketch plan showed a long scratch mark not far from the left edge of the road, and one of the photographs showed a basket and some cakes lying scattered about, also on the same side of the road. The learned trial judge found that the scratch mark in the plan was apparently made by the motor-cycle. This was clearly a reasonable inference from the evidence in the case. Taking into account the evidence of the plaintiff and his witnesses and upon a close scrutiny of the sketch plan and the photographs, he found as a fact that the accident took place very near the left edge of the road, either on the grass verge or on the road. He further found that, as the road was clear of other traffic at the time, the accident would not have happened if the defendant had not been negligent, and hence held him entirely to blame.

It is true that nowhere in his judgment has the learned judge said that he believed the evidence of the plaintiff and his witnesses, but that he preferred such evidence to the defendant's version of the accident as contained in his police report would appear to be abundantly clear, because he says that "the defendant's account of the accident as related in his report was highly improbable because it was unlikely that the three children would have crossed back the road immediately after they had crossed it." He further says that if the defendant was in fact going at 25 m.p.h. and had applied the brakes he failed to see how he could have knocked the plaintiff unless he was negligent. And he also found that the fracture of the plaintiff's right leg was more consistent with the plaintiff's story than that of the defendant. Whatever flaws one may be able to find in the judge's reasoning, and speaking for myself I cannot say that I can find any, there can be no doubt whatsoever that the plaintiff had established a *prima facie* case of negligence on the part of the defendant, which was not rebutted by any evidence before him. Perhaps the learned judge should have considered the question as to why the defendant after going over the wooden bridge shown on the sketch plan went off at a tangent on to the grass verge, but even if he had done so it would not have been open to him to speculate on the answer to that question.

The first ground of appeal is that the learned trial judge erred in holding that the accident could have happened on the grass verge. The short answer to that is that the learned trial judge did not say categorically that the accident happened on the grass verge. The finding of fact which he made was that the accident took place at a point somewhere near the left edge of the road.

The second ground of appeal is that the learned trial judge having found as a fact that the scratch mark on the sketch plan was made by the defendant's motor-cycle and having regard to the police photographs of the scene of the accident erred in holding the defendant liable for the accident. There might have been some substance in that ground of appeal if the learned trial judge had made his finding of fact solely on the sketch plan and the photographs, but coupled with that documentary evidence was the evidence of the plaintiff and his three witnesses, which had not been shaken by cross-examination. It has to be borne in mind that each of the witnesses had em-

phatically denied that he crossed or attempted to cross the road. I would therefore reject that ground of appeal.

It is next said that the learned trial judge erred in dismissing the defendant's account of the accident as highly improbable in the light of the evidence which was before him. In my judgment, the learned trial judge was entitled to reject the defendant's account of the accident because of the evidence of the plaintiff and his witnesses which he had before him. I do not think it would have been right for the learned trial judge to reject the evidence of the plaintiff and his witnesses merely on the strength of the defendant's statement in the police report, which after all was not substantive evidence in the true sense of the word Assuming that it was substantive evidence, it was not tested by the usual method of cross-examination.

It is finally said that the learned trial judge failed to consider the probability and possibility of contributory negligence on the part of the plaintiff. I do not think there is any substance in that argument. A mere possibility of contributory negligence is of no avail, and there was no evidence to suggest that on the balance of probabilities the defendant was guilty of contributory negligence.

To sum up on the question of liability, it would seem clear that the judgment appealed from was based almost entirely on findings of fact and that it is not open to this court to set aside such findings of fact. I would therefore dismiss the appeal as regards liability.

As regards quantum, the plaintiff suffered injuries on his forehead and the right leg which had to be amputated at the knee. The sum awarded to him as general damages is by no means against the general trend of awards in similar cases or inordinately high. The appeal against quantum therefore must also fail.

Ali F.J.: This is an appeal from the judgment of Pawan Ahmad J. in the High Court at Ipoh.

The respondent, the plaintiff in the action, was involved in an accident with a motor-cycle while walking on the road along Degong/Teluk Anson on the morning of February 21, 1969. He suffered injuries on the forehead and also on the right leg. The right leg from the knee was amputated. By his next friend he sued the motor-cyclist for damages on the ground of negligence. The plaintiff's case of negligence was founded on a number of particulars set out in paragraph 5 of the statement of claim. I shall in due course refer to some of these particulars on which findings of fact were arrived at by the trial court. The defence was a denial of negligence. It was stated in the statement of defence in these words:

"... collision was caused solely and/or contributed to entirely by the negligence of the plaintiff."

The word "entirely" would tend to negative any suggestion of contributory negligence in the sense that blame for the accident was to be shared proportionately as the appellant is now contending in this appeal However, for the purpose of this judgment, I shall assume that contributory negligence in the sense stated has been pleaded by the defence.

The dispute turned on the fact whether the respondent/plaintiff was knocked down by the appellant's motor-cycle from the rear as alleged in paragraph 3 of the statement of claim or that he was knocked down while attempting to cross the road as alleged in the statement of defence. The plaintiff and his witnesses all gave evidence to the effect that he was knocked down from the rear. They all said that they were walking on the grass verge some 2 feet from the edge of the road when the collision took place. They all denied any suggestion that the plaintiff was attempting to cross the road when he was knocked down. There were minor discrepancies, here and there, but they did not seem material enough to prevent the trial court from arriving at the finding that the respondent was knocked down from the rear. The learned trial judge found this consistent with the markings shown in the sketch plan. He was not, however, altogether satisfied that the collision occurred on the grass verge as stated by the plaintiff and his witnesses. He said it could be on the grass verge or on the road. But he seems reasonably satisfied that it occurred close enough to the left edge of the road. On such a finding it was fair inference that the motor-cyclist was either not keeping a proper look-out or if he was, he was riding too fast with complete disregard for the safety of those walking by the side of the road. Whichever it was, the plaintiff's evidence must have satisfied the trial court that a *prima facie* case of negligence has been made out against the defendant/appellant. Unless the defence could negative negligence by proper evidence the trial court would have no alternative but to enter judgment for the respondent. As it happened in this case no proper evidence could be adduced on behalf of the appellant. He did not appear at the trial. The learned trial judge granted him indulgence by adjourning the hearing of the case to another date to enable him to appear. This failed to serve its purpose. The defence counsel did what could possibly be done in the circumstances. In the absence of proper evidence to negative negligence he did his utmost to persuade the trial court not to attach much weight to the evidence of the plaintiff and his witnesses. He referred to certain discrepancies in their evidence. The plaintiff and his witnesses, undoubtedly, were still minors when they gave evidence. They were not sworn or affirmed. But they were all warned to speak the truth as required by section 6 of the Oath and Affirmation Ordinance 1949. Children injured in motor accidents or young witnesses have, in the past, given evidence in court and subjected to cross-examinations by opposing counsels. Whether their evidence has value is, of course, a matter for the trial court to consider and decide. The appellate court can, of course, come to a different view on any such evidence if the view of the trial court is clearly unwarranted by the evidence on record. Speaking for myself, I can find no reason for interfering with the trial court's finding of fact, so far as it was based on the oral evidence of the plaintiff and his witnesses. Defence counsel has also referred to the police report made by the appellant after the accident. The learned trial judge has considered the report but found it highly improbable that the accident could have happened in the manner described by the appellant. He said this in his judgment after considering the sketch plan which,

if I may say so, is capable of supporting either of the conflicting versions of the accident. Putting it at its lowest, even if this case has to be decided on the balance of probability, the learned trial judge, on the materials before him, was entitled to conclude that the appellant was wholly to blame for the accident. I have used the words "even if" advisedly, for in my view the police report in this case, though admissible by reason of section 35 of the Evidence Ordinance, was not substantive evidence of the fact, as asserted by the defence, that the plaintiff was knocked down while crossing the road. The report of the police officer who recorded it could only say this: "This is a statement by the appellant". To that extent the report was clearly hearsay evidence. Its inclusion in the agreed bundle was obviously on the assumption that the appellant would appear at the trial to testify. If he had done so, the report would undoubtedly have some value as corroborative evidence within the meaning of section 157 of the Evidence Ordinance. But standing by itself for the purpose of the present dispute it was clearly hearsay. The rule against hearsay evidence is expressed in *Phipson* on Evidence, 10th Edition (1963), page 280 as follows:

"The rule against hearsay excludes, in general, all statements oral or written, the probative force of which depends either wholly or in part on the credit of an unexamined person notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made and notwithstanding that no better evidence of the facts stated is to be obtained."

That is a rule at common law to which there are exceptions. Section 32 of our Evidence Ordinance contains these exceptions. It does not seem to me that the appellant's report in this case can possibly come within any of the exceptions. Strict adherence to the common law rule against hearsay was insisted upon by the House of Lords in *Myers* v. *Director of Public Prosecutions*.[8] At page 1024 Lord Reid said:

"... It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence. The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found to discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available."

In *G. (A.)* v. *G. (T.)*,[9] Lord Denning M.R. considered this rule against hearsay evidence and said on page 652:

"... If that statement ("I'm enclosing £5 for you from T") had been made by the lad's mother on oath, it would have been evidence of a payment by T. for the maintenance of the child. Not being made on oath, but in a letter — and the mother not being called — it is hearsay: and according to the common law, it is not admissible."

Referring to *Myers* v. *Director of Public Prosecutions*, *supra*, the Master of the Roll added:

"... Such being the common law about hearsay, we are not at liberty to depart from it."

Upon any view, therefore, the appellant's appeal on the question of liability must fail.

As regards quantum, counsel for the appellant has submitted that the award of $32,000 as general damages was excessive and against the trend of awards for similar cases. From the authorities cited, the awards in the similar cases do not seem to be so substantially different from the award in this case as to enable me to say that it is inordinately high. On this question too, the appeal fails.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Bala & Co.*